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No. 03-1273

IN THE

Supreme Court of the United States

THOMAS J. SPARGO, JANE McNALLY,
and PETER KERMANI,

Petitioners,

v.

NEW YORK COMMISSION ON JUDICIAL CONDUCT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the *Younger* abstention doctrine may be applied to claims brought in federal court that are unavoidably intertwined and inseparable from claims asserted in a pending state proceeding, where one plaintiff in the federal action is a party to the state proceeding, but the others are not.

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STATEMENT OF THE CASE

Petitioners Thomas J. Spargo, an elected New York state judge, and two of his political supporters, Jane McNally and Peter Kermani, challenged the constitutionality of various provisions of New York's Rules Governing Judicial Conduct ("Rules"), 22 N.Y.C.R.R. §§ 100.0 *et seq.*, claiming that they are facially invalid in light of this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The United States Court of Appeals for the Second Circuit, applying the abstention principles set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, declined to consider the merits of petitioners' First Amendment claims, and vacated the district court's judgment permanently enjoining enforcement of the challenged Rules by respondent New York State Commission on Judicial Conduct ("Commission"). While Spargo does not contest the Second Circuit's decision to abstain from adjudicating his own constitutional claims, McNally and Kermani seek review of the court's application of *Younger* to their claims.

A. Background

In 1999, Spargo ran a successful campaign for the position of Town Justice of Berne, New York. Pet. App. 6. In 2001, running on the Republican, Democratic, and Independence Party lines as a cross-endorsed candidate, he was elected to his current position as Justice of the Supreme Court for the Third Judicial District of the State of New York. *Id.*

In January 2002, the administrator of the Commission served upon Spargo a four-count complaint charging him with violating various provisions of the Rules. *Id.* Charge I of

that complaint alleges that in the course of his campaign for Town Justice, Spargo violated 22 N.Y.C.R.R. § 100.1 (regarding judicial independence), § 100.2(A) (regarding judicial impartiality), and § 100.5(A)(4)(a) (prohibiting unauthorized political activity) by offering a variety of items of value to town residents to induce them to vote for him. Pet. App. 6-7. Charge II alleges that in the fall of 2000, Spargo violated numerous Rules, including §§ 100.1 and 100.2(A),[1] by accepting the Albany County District Attorney-Elect as a client, even though the District Attorney's office regularly appeared in criminal cases before Spargo in his capacity as Town Justice. Pet. App. 7. Charge II further alleges that Spargo improperly presided over criminal cases prosecuted by the Albany County DA's office without disclosing to defense counsel that he previously had represented the District Attorney, and that the DA's campaign committee still owed him $10,000 in legal fees. *Id.* Charge III alleges that Spargo violated §§ 100.1, 100.2(A), and 100.5(A)(1)(c)-(e)[2] by attending, as a Republican Party and Bush/Cheney campaign observer, "'governmental sessions for the recount of presidential votes'" in 2000 in Florida, and by participating in a widely-publicized "'loud and obstructive demonstration'" outside the offices of the local elections

1. Charge II of the complaint also alleges that Spargo violated other provisions of the Rules, the constitutionality of which he has not challenged. Pet. App. 68 n.5.

2. These provisions prohibit a judge or judicial candidate from: (1) engaging in any partisan political activity, other than participating in his or her own campaign for elective judicial office, 22 N.Y.C.R.R. § 100.5(A)(1)(c); (2) permitting his name to be used in connection with any activity of a political organization, § 100.5(A)(1)(d); and (3) publicly endorsing or publicly opposing (other than by running against) another candidate for public office, § 100.5(A)(1)(e).

board with the aim of disrupting that recount process. Pet. App. 7. Charge IV alleges that Spargo violated §§ 100.1, 100.2(A), and 100.5(A)(1)(c)-(g)[3] by serving as the keynote speaker at the 39th Annual Monroe County Conservative Party Dinner, a fundraising event, at a time when he was a sitting judge, and not a candidate for elective office. Pet. App. 7-8.

In May 2002, the Commission administrator served upon Spargo a supplemental one-count complaint that charged him with violating §§ 100.1, 100.2(A), and 100.5(A)(4)(a) by authorizing his campaign committee to make two $5,000 payments not required by law. Pet. App. 8. One of these payments was a disbursement of $5,000 to petitioner Jane McNally, a longtime Democratic Party operative and volunteer for Spargo's election campaign who harbored no expectation of being paid for her services. *Id.* That disbursement was made after McNally had nominated Spargo as the Democratic Party's candidate for Supreme Court Justice. *Id.*

A hearing on the disciplinary charges was scheduled to commence before a Commission-designated referee on October 21, 2002, but on October 17, 2002, Spargo instituted an action in the United States District Court for the Northern District of New York seeking to invalidate §§ 100.1, 100.2(A), 100.5(A)(4)(a), and 100.5(A)(1)(c)-(g) as unconstitutional and to permanently enjoin the Commission from enforcing those provisions. Pet. App. 8-9.

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3. Section 100.5(A)(1)(f) prohibits a judge or judicial candidate from making speeches on behalf of a political organization or another candidate. Section 100.5(A)(1)(g) prohibits judges or judicial candidates from attending political gatherings.

Joining Spargo as plaintiffs were McNally and Peter Kermani, chairperson of the Albany County Republican Party. McNally alleged that the Commission's actions adversely affected her because "'the threat of sanctions against Spargo,'" as well as the possibility of like threats against other unnamed political candidates she might support in the future, "'impedes her freedom of speech, including her ability and desire to nominate and show support for particular candidates'" as a Democratic delegate at future party nominating conventions. *Id.* at 9-10. Likewise, Kermani alleged that "'as a member and chairman of the Republican party, he is restrained from associating with Spargo'" and other unnamed judicial candidates "'out of concern that [the] association would adversely impact Spargo.'" *Id.* at 10 (brackets in original). Kermani also alleged that he "'declined to invite Spargo'" and unnamed others to address his organization, "'despite a desire to do so, out of concern that such activity would result in [additional] charges being brought against Spargo.'" *Id.* (brackets in original).

B. Decisions Below

The district court found *Younger* abstention inapplicable, declared the challenged provisions of the Rules facially unconstitutional, and enjoined the Commission from enforcing them. Pet. App. 74-96. In explaining its refusal to abstain, the court noted that because McNally and Kermani were neither judges nor judicial candidates, they were not subject to the Commission's authority, and therefore the Commission's proceeding against Spargo would not resolve their constitutional challenges to the contested Rules. *Id.* at 75. The district court also suggested that while McNally and Kermani lacked standing "deriv[ed]" from Spargo's claims, they nevertheless had "direct" standing.

Id. at 76 n.7. The court further opined that the Commission's proceeding would not provide an adequate opportunity for judicial review of Spargo's constitutional claims, finding it "debatable" whether mandatory review was available to him in the New York Court of Appeals, *see* N.Y. Judiciary Law § 44(7) (Consol. 2004), the State's court of last resort. Pet. App. 77.

On appeal, the Second Circuit vacated the judgment, and remanded with instructions to abstain under *Younger*. The court noted that in two decisions rendered in June 2003 – *In re Watson*, 100 N.Y.2d 290, 794 N.E.2d 1 (N.Y. 2003), and *In re Raab*, 100 N.Y.2d 305, 793 N.E.2d 1287 (N.Y. 2003) – the New York Court of Appeals "erased any doubt as to the mandatory nature of its review" of Commission determinations, and confirmed that "judges and judicial candidates subject to disciplinary proceedings have the opportunity to raise First Amendment challenges before the [New York] Court of Appeals." Pet. App. 15; *see also id.* at 27. The court concluded that because Spargo, like the petitioner in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), had an adequate opportunity for judicial review of his federal constitutional claims in the ongoing state proceeding against him, *Younger* precluded the federal courts from considering the merits of his constitutional challenge to the Rules. Pet. App. 21-28.

As to McNally's and Kermani's claims, the Second Circuit found them "unavoidably intertwined and inseparable" from Spargo's. *Id.* at 38. The court explained:

> [T]he rights of recipients of speech (such as McNally and Kermani) derive in the first instance from the primary rights of the speaker. As a result,

> McNally and Kermani may claim no greater First Amendment protection than Spargo, and their success on the merits is entirely derivative of whatever rights that Spargo may have to engage in the prohibited speech and political activity. . . . McNally's and Kermani's claims are largely the mirror-image of Spargo's First Amendment challenge, and it would be impossible for the District Court to analyze [their] claims independently without first analyzing Spargo's constitutional right to engage in the charged conduct, a matter which, under *Younger*, must be resolved in the pending state disciplinary proceeding.

Pet. App. 36-38 (citations and internal punctuation omitted). The court also suggested that McNally's and Kermani's efforts to evade the *Younger* bar were at odds with their proffered reasons for having standing to press their claims: "Throughout this litigation, plaintiffs have relied almost exclusively on their close relationship with Spargo to establish an interest in the challenged judicial rules, and therefore, cannot now seek to downplay the connection to prevail on *Younger* grounds." Pet. App. 37-38 n.19.

Because of the intertwined nature of petitioners' claims, the Second Circuit found abstention applicable to McNally and Kermani, as well as to Spargo: "[T]his case presents one of the narrow circumstances in which *Younger* may properly extend to bar claims of third-parties who are not directly involved in the pending state action." Pet. App. 38-39. The court further found that the case for abstention "is particularly strong as to McNally, as Spargo is specifically charged with authorizing an improper payment" to her. *Id.* at 39 n.20.

The Second Circuit also questioned whether McNally and Kermani even had standing to bring claims regarding the speech of other unidentified judges or judicial candidates. The court noted that while alleging in a "conclusory fashion" that they had "refrained from associating with and supporting other judges and judicial candidates because of the disciplinary charges against Spargo," McNally and Kermani "have not specifically identified any other judges or judicial candidates who wish to engage in allegedly prohibited speech or political activity." *Id.* at 37 n.19. "[N]or does the record demonstrate that there is a likelihood of future disciplinary action" against any such person. *Id.* Because standing based on the speech of others requires "a willing speaker," the court concluded, the absence of such allegations raised "substantial doubt" about McNally and Kermani's standing and the ripeness of their claims. *Id.* (internal quotations omitted).

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S APPLICATION OF *YOUNGER* ABSTENTION IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Contrary to petitioners' contentions, the Second Circuit's application of *Younger* abstention to McNally's and Kermani's constitutional challenges to the Rules is fully consistent with this Court's precedents.

As the Second Circuit noted, *see* Pet. App. 33-34, this Court has held that *Younger* may bar a federal court's adjudication of claims that would interfere with a pending state proceeding, even where the federal action is brought by a "third party" not involved in the state proceeding. In *Hicks v. Miranda*, 422 U.S. 332 (1975), the Court held

that the federal courts could not decide the claims of two theater owners who sought to enjoin enforcement of a state obscenity statute, given that a state court criminal prosecution under that statute was pending against two of the theater's employees. Abstention was appropriate, the Court found, because the interests of the federal plaintiffs and state court defendants were "intertwined," and "the federal action sought to interfere with the pending state prosecution." *Id.* at 348-49. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court reaffirmed that where a plaintiff not a party to an ongoing state proceeding nevertheless is "closely related" to a party in that proceeding, *Younger* abstention is warranted. 422 U.S. at 928. On the facts of that case, however, the Court found that *Younger* posed no bar because the plaintiffs in *Doran* were unrelated "in terms of ownership, control, and management" to the party involved in the state proceeding. *Id.* at 929.

The Second Circuit's decision faithfully applies the *Hicks/Doran* framework. Its conclusion that McNally's and Kermani's claims more closely resemble the third-party claims in *Hicks*, rather than those in *Doran*, rests solely on the court's assessment of the closeness of their relationship with Spargo. Pet. App. 38-39. There is therefore no basis for claiming that the Second Circuit's legal analysis departs from that used in *Hicks* or *Doran*.

Petitioners' contention, *see* Pet. 8, 11-12, that the Second Circuit's decision conflicts with *Richards v. Jefferson County*, 517 U.S. 793 (1996), and *South Central Bell Telephone Company v. Alabama*, 526 U.S. 160 (1999), is untenable. Significantly, those cases involve the application of res judicata, not *Younger* abstention. *Richards* and *South Central Bell* also differ from the instant case because they involve

non-parties who were "strangers" to the parties involved in litigation. *See Richards*, 517 U.S. at 802; *South Central Bell*, 526 U.S. at 168. In contrast, McNally and Kermani can hardly be characterized as "strangers" to Spargo; the Second Circuit found their claims "inseparable" from and "derivative" of Spargo's. Pet. App. 38, 40-41. In any event, *Richards* and *South Central Bell* both acknowledge that the interests of a non-party may be sufficiently aligned with those of a party so as to result in significant legal consequences to the non-party. *Richards*, 517 U.S. at 799, 802; *South Cent. Bell Tel.*, 526 U.S. at 167-68 (res judicata may apply where a "special relationship" exists between two sets of plaintiffs, one of which was not a party to a proceeding).

Petitioners also complain, *see* Pet. 2, 18, 20, that the court below answered a question left unresolved in *Middlesex* – namely, whether *Younger* applies to a third-party who is not a party to a state disciplinary proceeding. In *Middlesex*, this Court merely directed the circuit court to determine if abstention was appropriate given the facts of that particular case, *see* 457 U.S. at 437 n.17; *Hicks* and *Doran* already had set forth the legal standard for making that decision. In any event, even if there was an open legal question, a lower federal appellate court's resolution of such an issue would be unexceptional.[4]

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4. Petitioners also suggest that the decision below is at odds with *Middlesex* on the ground that New Jersey's highest court supposedly entertains constitutional challenges to that state's judicial conduct rules, but New York's highest court does not. *See* Pet. 19, 24. However, the New York Court of Appeals and the Second Circuit have found that both the Commission and the New York Court of Appeals itself can and do consider constitutional challenges to New York's Rules. *See Watson*, 100 N.Y.2d at 298, 794 N.E.2d at 4; *Raab*, 100 N.Y.2d at 312-13, 793 N.E.2d at 1289-90; Pet. App. 15, 27.

II. THE SECOND CIRCUIT'S APPLICATION OF *YOUNGER* ABSTENTION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

Petitioners appear to seek error correction from this Court, rather than expressly asserting a split among the circuits regarding the application of *Younger* to "third-party" claims. To the extent the petition's references to the decisions of other circuits can nonetheless be read to imply the existence of a square conflict, *see* Pet. 12-15, none exists. The cases to which petitioners cite utilize the same analysis articulated in *Hicks* and *Doran* and employed by the Second Circuit below. That other circuits have declined to abstain from deciding third-party claims in certain instances demonstrates only that abstention is appropriate in some factual circumstances but not others; it does not reveal any inconsistency among the legal standards adopted by the various circuits.

Petitioners point to *Robinson v. Stovall*, 646 F.2d 1087 (5th Cir. 1981), in which the Fifth Circuit found that *Younger* abstention did not bar a constitutional challenge to a parade ordinance brought by plaintiffs who never had been arrested under its provisions, even though state court prosecutions for violating the ordinance were pending against other plaintiffs. 646 F.2d at 1090. The Fifth Circuit's decision was based largely on its conclusion that the relationship between the non-arrested federal plaintiffs and the plaintiffs subject to pending state prosecutions was attenuated: "Instead of a close groups of activists, this case presents a loose organization of several hundred members and an unknown

number of 'supporters.'" *Id.* at 1092. The Second Circuit, in contrast, found that McNally, Kermani, and Spargo shared a close relationship and mutual interests, and concluded that abstention therefore was required. Pet. App. 38-39.[5]

In any event, just one year after *Robinson*, the Fifth Circuit unequivocally held in *Women's Community Health Center of Beaumont v. Texas Health Facilities Commission*, 685 F.2d 974 (5th Cir. 1982), that *Younger* can bar "third-party" claims. It abstained from hearing the claims of federal plaintiffs, including two doctors and three pregnant women, who challenged an ongoing state court enforcement proceeding against a medical facility that offered abortions, even though those plaintiffs were not parties to the state court proceeding. 685 F.2d at 981-82. While "the general rights of the plaintiff women and doctors in making the abortion decision are legally distinct from any rights the [health center] may assert," the court held that "*Younger* cannot be avoided simply by joining nonparties to the state court proceeding in order to procure injunctive and declaratory relief against that proceeding." 685 F.2d at 982.

The decision below is also fully consistent with the Eighth Circuit's ruling in *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d 874 (8th Cir. 2002), cited by petitioners. *See* Pet. 12. In that case, the Eighth Circuit applied *Younger* abstention to the claims of two federal plaintiffs, providers

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5. *Robinson* also differs from this case in two other ways. First, the Fifth Circuit identified "no contention that [the non-arrested plaintiffs] lack standing," *id.* at 1090, but the Second Circuit below questioned McNally's and Kermani's standing, Pet. App. 37 n.19. Second, the Fifth Circuit stressed that plaintiffs in that case sought only "prospective relief," *Robinson*, 646 F.2d at 1090-91, in contrast to McNally and Kermani, who seek to directly enjoin the ongoing state proceeding against Spargo, Pet. App. 39.

of wireless telephone services, who sought declaratory and injunctive relief prohibiting enforcement of a state consumer protection statute against them. 280 F.3d at 881-82. The court did so for two reasons: first, because these two providers were closely related in terms of common ownership to another wireless service provider against whom a state enforcement action had been commenced, and second, because any injunction they might obtain in federal court would create a "serious possibility of interference" with the ongoing state proceeding. *Id.* at 882. Conversely, the court found *Younger* abstention did not apply to the claims of a third provider who "[did] not seek to interfere with the proceeding in state court" and who lacked a similarly "close relationship" with the plaintiff involved in the state court proceeding. 280 F.3d at 882.

As with the other cases cited by petitioners, the outcome in *Cedar Rapids* turns on the facts of the case; the legal standard employed by that court is consistent with that used by the Second Circuit below. Indeed, the Eighth Circuit expressly noted that *Younger* could bar "third-party" claims: "It is not a prerequisite to *Younger* abstention that the federal plaintiffs also be defendants in the action pending in state court." 280 F.3d at 881. Thus, "parties in federal and state court need not be identical where the interests of the parties seeking relief in federal court are closely related to those of the parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings." 280 F.3d at 882 (internal citations and quotations omitted) (citing *Hicks*, 422 U.S. 332).

The Ninth Circuit's decision in *Green v. City of Tucson*, 255 F.3d 1086 (9th Cir 2001) (*en banc*), also applies the same *Hicks/Doran* framework used by the Second Circuit.

In *Green*, one set of plaintiffs brought a state court action challenging the constitutionality of a state statute regarding the incorporation of cities and towns. Another group of plaintiffs – who, unlike McNally and Kermani, were unrelated to the state court plaintiffs – brought an independent action in federal court raising the same constitutional claims. 255 F.3d at 1090-91. These plaintiffs did not "seek to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings," *id.* at 1098, but instead simply requested declaratory relief that likely would have affected the state proceeding. The Ninth Circuit concluded that the "[c]ongruence of interests" shared by both sets of plaintiffs was alone not enough to divest a federal court of jurisdiction under *Younger*. 255 F.3d at 1100. It explicitly acknowledged, however, the same legal conclusion adopted by the Second Circuit – that "a party whose interest is so intertwined with those of the state court party that direct interference with the state court proceeding is inevitable may, under *Younger*, not proceed." 255 F.3d at 1100.

Finally, petitioners make much of the Second Circuit's reference to two decisions from the First and Third Circuits, which discuss application of *Younger* to challenges brought by individuals who were not parties to pending state court proceedings. *See* Pet. 13-14 (citing *Casa Marie v. Superior Court of Puerto Rico*, 988 F.2d 252 (1st Cir. 1992), and *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey St. Bd. of Higher Educ.*, 654 F.2d 868 (3d Cir. 1981)). Neither of these cases squarely conflicts with the decision below.

In *Casa Marie*, the First Circuit found that *Younger* applied to the claims of federal plaintiffs who were not parties

to a state court proceeding, but subsequently sought to enjoin a decree issued in that litigation. 988 F.2d at 267-68. In discussing the *Hicks/Doran* framework, the court noted that while there might be "some instances" in which *Younger* could not be applied to "a federal plaintiff who was not a party, or not 'closely related' to a party, in the pending state court proceeding," there "plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any one of them." 988 F.2d at 266 (quoting *Doran*, 422 U.S. at 928-29).[6] The First Circuit did suggest that plaintiffs who were unable to intervene in pending state court proceedings would not be subject to an abstention bar. 988 F.2d at 267 (citing *New Jersey-Philadelphia Presbytery*, 654 F.2d at 882). But because the third-party plaintiffs in *Casa Marie* were, in fact, able to intervene in the ongoing state proceeding, this statement was merely *dictum* and cannot serve as the basis of a conflict among the circuits.

In *New Jersey-Philadelphia Presbytery*, the Third Circuit held that federal plaintiffs, who sought to challenge the constitutionality of a school licensing scheme and enjoin enforcement of a state court order in furtherance of that scheme, were not precluded under *Younger* because they were not parties to an ongoing state court proceeding addressing the same issue. 654 F.2d at 877. Essential to the Third Circuit's holding, however, was its characterization of the relationship between the "third-party" plaintiffs and the state court plaintiff: "Each of these plaintiffs has asserted

6. The First Circuit observed that *Younger* did not bar parallel challenges to the constitutionality of a state statute brought by "unrelated, legally distinct parties," 988 F.2d at 267-68, as did the Second Circuit below, *see* Pet. App. 35-36 (citing, *inter alia*, *Casa Marie*, 988 F.2d at 267-68).

individual first and fourteenth amendment rights distinct from those" asserted by the party to the state court proceeding. *Id.* As such, the court found that "the nonparties here do not fall within the *Hicks-Doran* 'nexus' with the state defendants" that would otherwise prohibit their federal action. 654 F.2d at 880. The Third Circuit, however, affirmed that "there might be cases in which nonparty plaintiffs might be precluded from bringing a federal action . . . because they might be so interrelated . . . that pursuit of a separate federal action would undermine *Younger*." 654 F.2d at 880. The court noted that in *Hicks*, *Younger* abstention was properly applied to bar the federal action because the "first amendment right" of the employees derived from "their . . . assert[ion of] the employer's right to show the film." 654 F.2d at 878.

That is precisely the circumstance here, for the Second Circuit found that McNally's and Kermani's claims "are essentially derivative" of Spargo's. Pet. App. 38. The court below noted that McNally and Kermani "do not assert independent First Amendment rights [distinct from Spargo's], nor do they bring truly separate challenges to the judicial conduct rules." *Id.* at 36. On this basis, and consistent with *Hicks*, the Second Circuit concluded that "*Younger* may properly extend to bar claims of third-parties who are not directly involved in the pending state action." Pet. App. 38-39.

III. NEW YORK'S JUDICIAL CONDUCT RULES PLAINLY ARE NOT "FLAGRANTLY AND PATENTLY VIOLATIVE OF EXPRESS CONSTITUTIONAL PROHIBITIONS."

Petitioners claim that the Second Circuit's application of *Younger* abstention was improper because New York's Rules are "'flagrantly and patently violative of express constitutional prohibitions.'" Pet. Br. 22 (quoting *Younger*, 422 U.S. at 53-54). This contention is completely meritless. The challenged Rules are fully constitutional, and petitioners' lengthy arguments on this point, *see* Pet. 21-30, are nothing more than a thinly-disguised effort to have this Court reach out to resolve their constitutional claims.

In any event, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), upon which petitioners primarily rely, *see* Pet. 21-25, does not control this case. In *White*, this Court invalidated Minnesota's "announce" clause, which prohibited a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues." *Id.* at 768. New York's Rules do not include an "announce" clause, and the Rules that govern a judicial candidate's speech in the course of a campaign are not at issue here.[7] Instead, the Rules which Spargo was charged with violating govern "ancillary political activity" that is

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7. Those provisions of the Rules prohibit judges or judicial candidates from making (1) "pledges or promises of conduct in office"; (2) "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court"; and (3) "any false statement or mispresent[ation about] the identity, qualifications, current position or other fact concerning the candidate or an opponent." 22 N.Y.C.R.R. §§ 100.5(A)(4)(d)(i)-(iii). This Court did not decide the constitutionality of such restrictions in *White*. *See* 536 U.S. at 773 n.5.

"in support of *other* candidates or party objectives." *Raab*, 100 N.Y.2d at 315, 793 N.E.2d at 1292 (emphasis added); *see* 22 N.Y.C.R.R. §§ 100.5(A)(1)(c)-(g). Because the Rules that plaintiffs challenge do not implicate the ability of a candidate to speak about her qualifications for public office, *see White*, 536 U.S. at 774, these provisions are "significantly distinguishable" from the restrictions invalidated in *White*. *Raab*, 100 N.Y.2d at 312-13, 793 N.E.2d at 1290; *see also Watson*, 100 N.Y.2d at 301, 794 N.E.2d at 6.

Petitioners also claim that the challenged Rules are void for vagueness. Pet. 26-29. *White* did not address vagueness and, in any event, the Rules provide ample notice of prohibited conduct, particularly when considered in light of the substantial body of case law authored by this Court, the New York Court of Appeals, the Commission, and New York's Advisory Committee on Judicial Ethics. Moreover, any judge or judicial candidate may request an advisory opinion about the propriety of specific conduct from the State's Advisory Committee on Judicial Ethics. *See* N.Y. Judiciary Law § 212(2)(l) (Consol. 2004); *see also Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973) (statute not void for vagueness in light of availability of advisory opinion); *Arnett v. Kennedy*, 416 U.S. 134, 159 (1974) (same).

IV. THIS CASE PRESENTS A POOR VEHICLE FOR CONSIDERING THE SCOPE OF *YOUNGER* ABSTENTION

Even if this Court wishes to revisit the application of *Younger* to third-parties like McNally and Kermani, the decision below provides a poor vehicle for doing so. The Second Circuit expressed "substantial doubt as to whether plaintiffs have standing to seek equitable relief based

on the speech of other judges, and even if plaintiffs could demonstrate such standing, whether the controversy is sufficiently ripe for adjudication." Pet. App. 37 n.19. The court found that McNally and Kermani provided only "conclusory" and "speculative" allegations that they have "refrained from associating with and supporting other judges and judicial candidates because of the disciplinary charges against Spargo." *Id.* at 37 n.19. They failed to "identif[y] any other judges or judicial candidates who wish to engage in allegedly prohibited speech or political activity, nor does the record demonstrate that there is a likelihood of future disciplinary action against any judge or judicial candidate whom McNally and Kermani wish to support politically." *Id.*[8]

This Court's decision in *White* does not "control[]" the question of McNally's and Kermani's purported standing, as petitioners allege. Pet. 17. The parties to *White* never briefed that issue to this Court, nor did the Court pass upon it. In any event, had the Court *sua sponte* identified a defect in the standing of the non-candidate parties in *White*, it still would have been obligated to reach the merits in that case, because the standing of the candidate himself was uncontested and unquestionable. Nor is the Eighth Circuit's cursory standing analysis in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001), on point. The Eighth Circuit found that non-candidates who wished to associate with a judicial candidate had standing to challenge Minnesota's judicial

8. Such speech from these unspecified judges or judicial candidates might actually be permitted by the Rules if it occurred during the "window period" around a campaign. *See* 22 N.Y.C.R.R. § 100.5(A)(2) (setting forth political activities that are authorized during the pendency, and for a short time following, a campaign for judicial office).

conduct rules based on evidence that they had in fact refrained from taking part in campaign activities for fear of subjecting the candidate to discipline. *Id.* at 860-61 & n.6. Here, however, McNally and Kermani have admitted that they freely supported Spargo and engaged in speech and associational activity related to his campaign, and their allegations as to their activities with respect to other judges or judicial candidates are entirely speculative. Pet. App. 37 n.19.

The Second Circuit concluded it would "decide [this] case under *Younger* without addressing the plaintiffs' constitutional standing to bring suit." Pet. App. 18. Should the Court grant certiorari and then determine that it is necessary to resolve McNally's and Kermani's standing before deciding the *Younger* issue, the Court would be required to do so without the benefit of any decision by the circuit court on this point.[9]

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9. In addition, the proceeding against Spargo involves one charge that rests in part on provisions of the Rules that Spargo has not challenged as unconstitutional. Specifically, Charge II alleges that while a sitting town justice, Spargo presided over criminal cases prosecuted by the Albany County District Attorney's office without disclosing to defense counsel that he had previously represented the District Attorney in a private capacity, and that he still was owed payment for those services. Pet. App. 7. Even if this Court were to grant certiorari and then conclude that abstention was not appropriate as to McNally's and Kermani's claims, the Commission could still proceed in the interim to adjudicate Charge II. Should that charge be sustained, the Commission could determine that Spargo be admonished, censured, or removed from office. *See* N.Y. Judiciary Law § 44(7) (Consol. 2004); 22 N.Y.C.R.R. § 7000.7(c). If Spargo were removed from the bench, the Rules no longer would apply to his speech or conduct, and therefore his constitutional challenge to the Rules would be rendered moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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